

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 02-33826

JON C. BANDY
a/k/a JOHN BANDY
POLLY BANDY

Debtors

JULIA MAJERNIK

Plaintiff

v.

Adv. Proc. No. 02-3176

JON C. BANDY and
POLLY BANDY

Defendants

**MEMORANDUM ON MOTION TO RECONSIDER
GRANTING OF SUMMARY JUDGMENT**

APPEARANCES: WINCHESTER, SELLERS, FOSTER & STEELE, P.C.

Gordon D. Foster, Esq.
Suite 1000, First Tennessee Plaza
800 South Gay Street
Knoxville, Tennessee 37929
Attorneys for Plaintiff

GAIL F. WORTLEY, ESQ.
3715 Powers Street
Knoxville, Tennessee 37917
Attorney for Defendants/Debtors

**RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE**

This matter is before the court on the Motion to Reconsider Granting of Summary Judgment (Motion to Reconsider) filed by the Defendants (Debtors) on January 21, 2003. In their Motion to Reconsider, the Debtors ask the court to consider their Opposition to Motion for Summary Judgment, together with their accompanying Memorandum of Law in Support of Opposition to Motion for Summary Judgment and Response to Statement of Material Facts (the Opposition Documents), filed on January 7, 2003.¹

I

The Debtors filed their Chapter 7 bankruptcy case on July 23, 2002. The Plaintiff filed the complaint initiating this adversary proceeding on October 4, 2002, seeking a determination that two Knox County Chancery Court judgments (the Knox County Judgments) entered in her favor and against the Debtors in the sum of \$165,023.97 were nondischargeable under 11 U.S.C.A. § 523(a)(4) (West 1993). On December 17, 2002, the Plaintiff filed a Motion for Summary Judgment, together with seven exhibits, two affidavits, a Statement of Material Facts, and a Memorandum of Law, specifically arguing that the Debtors violated their fiduciary duty to her and that because this matter had already been litigated in the Knox County Chancery Court, it was barred by collateral estoppel from being re-litigated in this court. The Debtors filed their Opposition Documents on January 7, 2003. The court entered a Judgment (the Summary

¹ Although the Debtors do not specifically ask the court to vacate or otherwise amend the January 14, 2003 summary Judgment awarded the Plaintiff, the court, pursuant to Federal Rule of Civil Procedure 59(e), applicable to this proceeding through Federal Rule of Bankruptcy Procedure 9023, will nonetheless treat the Debtors' Motion to Reconsider as a motion to alter or amend the Judgment.

Judgment Order) in favor of the Plaintiff on January 14, 2003, accompanied by a Memorandum on Motion for Summary Judgment (the January 14, 2003 Memorandum).

II

In the January 14, 2003 Memorandum filed contemporaneously with the Summary Judgment Order, the court stated that since the Debtors' Opposition Documents "[were] not filed within twenty days after the Motion was filed, as required by E.D. Tenn. LBR 7007-1, [they] will not be considered." *Majernik v. Bandy (In re Bandy)*, No. 02-3176, slip op. at 2 (Bankr. E.D. Tenn. Jan. 14, 2003). However, as the Motion to Reconsider correctly points out, pursuant to a Proposed Discovery Plan filed by the parties on December 6, 2002, and incorporated into the Pre-Trial Order entered on December 26, 2002, the deadline for filing responses to dispositive motions was January 9, 2003, three days beyond the twenty-day deadline imposed by E.D. Tenn. LBR 7007-1. The court was therefore mistaken in not considering the Opposition Documents filed by the Debtors.

Having now considered the Debtors' Opposition Documents, the court has determined that the outcome remains the same. For reasons hereinafter explained, the January 14, 2003 Summary Judgment Order will not be vacated.

III

First, in their Opposition Documents, the Debtors assert that the Knox County Judgments are dischargeable under § 523(a)(4) as to Mr. Bandy because he was not in a fiduciary relationship

with the Plaintiff. The Debtors argue that because only Mrs. Bandy was a party to the Durable Power of Attorney with the Plaintiff, and since there are no writings specifically giving Mr. Bandy a power of attorney, a fiduciary relationship never existed between the Plaintiff and Mr. Bandy. The Debtors therefore maintain that the Knox County Judgments are dischargeable as to him.

In the court's January 14, 2003 Memorandum, this issue was discussed in detail, and the court found the following:

Defalcation as contemplated by § 523(a)(4) requires proof of: 1) a fiduciary relationship; 2) breach of that fiduciary relationship; and 3) a resulting loss." *R.E. Am., Inc. v. Garver (In re Garver)*, 116 F.3d 176, 178 (6th Cir. 1997); see also BLACK'S LAW DICTIONARY 417 (6th ed. 1994) (defining defalcation as "misappropriation of trust funds or money held in any fiduciary capacity; failure to properly account for such funds."). In the Sixth Circuit, "the debtor must hold funds in trust for a third party" for a fiduciary relationship to exist. *Garver*, 116 F.3d at 179. Accordingly, "the defalcation provision of § 523(a)(4) is limited to only those situations involving an express or technical trust relationship arising from placement of a specific res in the hands of the debtor." *Id.* at 180.

In Tennessee, an express trust relationship can be created "by the direct and positive acts of the parties, by some writing, . . . or by the action of a court in the exercise of its authority" *Jackson v. Dobbs*, 290 S.W. 402, 404 (Tenn. 1926) (quoting *Lafferty v. Turley*, 35 Tenn. 157, 163 (1855)). Here, the writing in question is the Durable Power of Attorney, and the issue is whether this document created a fiduciary relationship between the Plaintiff and the Debtors under Tennessee law.

"All acts done by an attorney in fact pursuant to a durable power of attorney . . . have the same effect and inure to the benefit of and bind the principal" TENN. CODE ANN. § 34-6-103 (2001). Because "[o]ne acting pursuant to a durable power of attorney must act in the principal's best interests and within the scope of authority granted by the statute [Tennessee Code Annotated section 34-6-109] and the principal, . . . the relationship between the attorney in fact and the principal is subject to the laws of agency." *Eaton ex rel. Johnson v. Eaton*, 83 S.W.3d 131, 134 (Tenn. Ct. App. 2001). Under Tennessee law, "the relationship between the agent and principal is fiduciary in nature and generally treated with the same gravity and strictness as the trustee-beneficiary relationship . . . [and the] agent, as a fiduciary, is under a duty of loyalty to the principal." *Id.* (citing *Marshall v. Sevier*

County, 639 S.W.2d 440, 446 (Tenn. Ct. App. 1982) and *Pridemore v. Cherry*, 903 S.W.2d 705, 707 (Tenn. Ct. App. 1995)). Additionally, “[a] person who receives the principal’s property from an agent of another, with notice that the agent is thereby committing a breach of fiduciary duty to the principal, holds the property thus acquired as a constructive trustee, or at the election of the principal, is subject to liability for its value.” *Id.* (quoting RESTATEMENT (SECOND) OF AGENCY § 314 (2000)).

In the case presently before the court, under Tennessee law, the terms of the Durable Power of Attorney created a fiduciary relationship between the Plaintiff and Ms. Bandy. Additionally, the August 10, 2001 Order entered in the Knox County Chancery Court makes the following finding of fact:

1. The Respondents [Polly Bandy and Jon C. Bandy] have in no way proven that they have expended the assets of Petitioner in compliance with their obligations as a fiduciary under the laws of the state of Tennessee;

August 10, 2001 Order. This finding of fact clearly states that the court found a fiduciary relationship existed with the Plaintiff, under Tennessee law, as to both of the Debtors. As such, the first prong of the *Garver* test is met.

Majernik v. Bandy (In re Bandy), No. 02-3176, slip op. at 6-8 (Bankr. E.D. Tenn. Jan. 14, 2003).

The Debtors’ arguments and assertions contained in their Opposition Documents do not change the fact that the Knox County Chancery Court specifically found that a fiduciary relationship did exist between the Plaintiff and both Mr. and Mrs. Bandy.

IV

Next, the Debtors argue in their Opposition Documents that collateral estoppel cannot apply to Mr. Bandy because whether or not he had a fiduciary relationship with the Plaintiff was never litigated in the Knox County Chancery Court. Again, the court refers to its January 14, 2003 Memorandum, which addressed this issue as follows:

Under Tennessee state law, “collateral estoppel bars relitigation of an issue if it was raised in an earlier case between the same parties, actually litigated, and necessary to the judgment of the earlier case.” *Rally Hill Prods., Inc. v. Bursack (In re Bursack)*, 65 F.3d 51, 54 (6th Cir. 1995) (citing *Massengill v. Scott*, 738 S.W.2d 629, 632 (Tenn. 1987)). “[M]aterial facts or questions, which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and . . . such facts or questions become res judicata and may not again be litigated in a subsequent action between the same parties.” *Booth v. Kirk*, 381 S.W.2d 312, 315 (Tenn. Ct. App. 1963) (quoting *Cantrell v. Burnett & Henderson Co.*, 216 S.W.2d 307, 309 (Tenn. 1948)). Applying this standard to the case before this court, the determination of nondischargeability remains the same.

First, the parties to this dischargeability action are the same parties as in the Knox County Chancery Court Lawsuit. Second, the issues which are pertinent to the dischargeability determination, *i.e.*, the existence of a fiduciary relationship, breach of a fiduciary relationship, and actual loss, were also issues in the Knox County Chancery Court Lawsuit, based upon the same material facts and questions of law as to the Debtor’s misappropriation of and failure to account for funds entrusted to them by the Plaintiff. The court is persuaded that these issues were “actually litigated” quite vigorously by evidence that the Debtors hired an attorney, filed an answer to the complaint in which they admitted to both the existence of the Durable Power of Attorney and their transferring of the funds in question, filed many motions, and participated in the trial held in the Knox County Chancery Court on July 26, 2001. Moreover, the court relies upon the August 10, 2001 Order which specifically recites the Chancellor’s findings of fact that a fiduciary relationship existed, was breached, and actual damages were incurred by the Plaintiff. Finally, these issues were necessary for a judgment by the state court for misappropriation as well as being necessary for a determination by this court that the debt is nondischargeable.

Majernik v. Bandy (In re Bandy), No. 02-3176, slip op. at 10-11 (Bankr. E.D. Tenn. Jan. 14, 2003) (footnotes omitted). As previously stated, in the court’s opinion, the Knox County Chancery Court judgment is determinative on this issue.

V

In summary, the court has now reviewed and considered the Opposition Documents filed by the Debtors and has determined that they present no argument or theory not already considered by the court in its resolution of the Plaintiff's Motion for Summary Judgment. The Motion to Reconsider will accordingly be denied.

An order consistent with this Memorandum will be entered.

FILED: February 4, 2003

BY THE COURT

/s/

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

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ORDER

For the reasons stated in the Memorandum on Motion to Reconsider Granting of Summary Judgment filed this date, the court directs that the Motion to Reconsider Granting of Summary Judgment filed by the Defendants on January 21, 2003, having been deemed by the court to be a motion to alter or amend the summary Judgment granted the Plaintiff on January 14, 2003, filed pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, is DENIED.

SO ORDERED.

ENTER: February 4, 2003

BY THE COURT

/s/

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE